ASDANUSI DAUT & ANOR

v.

PP

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
KC VOHRAH JCA
MOHAMED NOOR AHMAD JCA
[CRIMINAL APPEAL NO: W-05-59-1998]
22 JUNE 2004

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Section 2 - Trafficking in a dangerous drug - Common intention, whether established - Whether there was a pre-arranged plan - Whether accused had knowledge that bag contained dangerous drug - Definition of trafficking, whether 'subject to requirement of context' - Whether there was a 'negotiated sale' - Whether conviction unsafe - Whether accused had control of bag containing dangerous drug - Whether s. 37(d) applicable - Whether offence under s. 39A(2) proved*

The two defendants/appellants herein were charged and convicted for trafficking in a dangerous drug (2,411.9g of cannabis) under s. 39B of the Dangerous Drugs Act 1952 ('DDA') and were sentenced to death. At the trial, evidence was led to show that the 2nd defendant had telephoned the agent provocateur ('PW3') with an offer to sell the latter some drugs. Both the defendants then proceeded on a motorcycle (with the 1st defendant riding pillion) to meet up with PW3 at the pre-arranged location. Upon their arrival thereat, the 1st defendant, at the request of the 2nd defendant, handed a bag containing the dangerous drug to PW3. Both the defendants were then arrested by the police. The two points that were considered by the justices of appeal herein concerned the issues of 'common intention' and 'negotiated sale'.

Held (allowing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] As both the defendants were charged for trafficking in a dangerous drug with a common intention, the prosecution must establish that ingredient. It had to show that there was a pre-arranged plan to traffic in a dangerous drug, and that the trafficking (which formed the subject-matter of the charge) was done in concert pursuant to that pre-arranged plan. It followed, therefore, that the prosecution must establish that the 1st defendant had knowledge that the bag contained the proscribed drug. This was, however, not proved as the mere presence of the 1st defendant at the scene (and his acquiescence to the 2nd defendant's request to hand over the bag to

PW3) admitted of the possibility or inference that he (the 1st defendant) was unaware of the contents of the bag. Once the case against the 1st defendant fell, the element of common intention became irrelevant *vis-à-vis* the 2nd defendant. (pp 672 e-g, 673 a-c, f & g)

[2] The wide definition of 'trafficking' under the DDA is 'subject to the requirement of context'. The crux of the prosecution's case against the 2nd defendant, in the present context, was that he was involved in the sale of a dangerous drug to PW3. The learned judge, however, had overlooked the fact that the evidence did not disclose a 'negotiated sale'. The conviction of the 2nd defendant under s. 39B(2) of the DDA was, in the circumstances, unsafe. (pp 673 g-h & 674 a-b)

[3] Nevertheless, the evidence showed that the 2nd defendant had the bag containing the dangerous drug under his control. Section 37(d) of the DDA would, therefore, apply. The prosecution has established, beyond a reasonable doubt, that the 2nd defendant was in possession of the 2,411.9g of cannabis. (p 674 d-f)

[Conviction quashed; 1st defendant acquitted and discharged; 2nd defendant's conviction under s. 39B(2) DDA set aside and substituted with one under s. 39A(2) DDA.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Kedua-dua defendan/perayu di sini telah dituduh dan disabitkan atas kesalahan mengedar dadah berbahaya (2,411.9g cannabis) di bawah s. 39B Akta Dadah Berbahaya 1952 ('ADB') dan telah dijatuhkan hukuman mati. Semasa perbicaraan, keterangan telah dikemukakan bahawa defendan kedua telah menelefon agen provokator ('PW 3') dan menawarkan untuk menjual sejumlah dadah kepadanya. Kedua-dua defendan kemudian pergi berjumpa PW3 di satu tempat yang dijanjikan dengan menaiki sebuah motosikal (defendan pertama membonceng). Apabila sampai di tempat yang dijanjikan, defendan pertama, atas permintaan defendan kedua, telah menyerahkan beg yang mengandungi dadah berbahaya kepada PW3. Berikutan itu, kedua-dua defendan telah ditangkap oleh polis. Dua perkara yang dipertimbang oleh hakim-hakim rayuan di sini adalah menyentuhi isu-isu 'niat bersama' dan 'penjualan secara rundingan'.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram menyampaikan penghakiman mahkamah:

[1] Oleh kerana kedua-dua defendan dituduh mengedar dadah berbahaya dengan niat bersama, pendakwaan hendaklah membuktikan ingredien tersebut. Pendakwaan perlu membuktikan bahawa terdapat suatu rancangan sebelum itu untuk mengedar dadah berbahaya, dan bahawa, pengedaran, (yang

menjadi inti pertuduhan) telah dilakukan secara bersama ekoran rancangan yang dibuat tersebut. Ianya dengan itu mengikut bahawa pendakwaan mestilah membuktikan bahawa defendan pertama mempunyai pengetahuan bahawa beg berkenaan mengandungi dadah terlarang. Ini bagaimanapun telah tidak dibuktikan, memandangkan kehadiran semata-mata defendan pertama di tempat kejadian (dan kepatuhannya kepada permintaan defendan kedua untuk menyerahkan beg kepada PW3) menjurus kepada kemungkinan atau andaian bahawa beliau (defendan pertama) tidak menyedari tentang kandungan beg. Sebaik sahaja kes terhadap defendan pertama runtuh, elemen niat bersama *vis-a-vis* defendan kedua sudah tidak relevan lagi.

[2] Definasi 'mengedar' yang luas di dalam ADB adalah 'tertakluk kepada keperluan-keperluan konteks'. Asas kes pendakwaan terhadap defendan kedua, dalam konteks kes semasa, adalah bahawa beliau terlibat dalam penjualan dadah berbahaya kepada PW3. Yang arif hakim, bagaimanapun, telah terlepas pandang akan fakta bahawa keterangan tidak menunjukkan adanya sebarang 'penjualan secara rundingan'. Dalam keadaan sedemikian, sabitan terhadap defendan kedua di bawah s. 39B(2) ADB adalah tidak selamat.

[3] Walau bagaimanapun, keterangan menunjukkan bahawa defendan kedua mempunyai kawalan terhadap beg yang mengandungi dadah berbahaya tersebut. Seksyen 37(d) ADB, dengan itu, menjadi terpakai. Pendakwaan telah membuktikan bahawa defendan kedua mempunyai milikan terhadap 2,411g cannabis di luar keraguan munasabah.

Sabitan dibatalkan; defendan pertama dilepas dan dibebaskan; sabitan terhadap defendan kedua di bawah s. 39B(2) ADB diketepikan dan diganti dengan sabitan di bawah s. 39A(2) ADB.]

Case(s) referred to:
Chow Kok Keong v. PP [1998] 2 CLJ 469 FC ***(foll)***
Jones v. Dunkel [1958-1959] 101 CLR 298 ***(refd)***
PP v. Mohd Farid Mohd Sukis & Anor [2002] 3 MLJ 401 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), 39A(2), 39B(2)

For the appellants - Karpal Singh (Jagdeep Singh Deo); M/s Karpal Singh & Co
For the respondent - Nordin Hassan DPP

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-3-1997]

Reported by Gan Peng Chiang

a

JUDGMENT

Gopal Sri Ram JCA:

There are two appellants here. They were both convicted of an offence of trafficking in a dangerous drug under the Dangerous Drugs Act 1952 ("the Act") and sentenced to death. The trial judge has dealt with the factual b background in much detail. A brief review of the facts therefore suffices.

PW3 is a police officer. He acted as agent provocateur in the case. He received a phone call during which he was offered some drugs. There was no bargaining about the quantity or the price. It was proved as a fact that the caller was the second appellant. Later, PW3 met the two appellants at a previously arranged c place. The appellants came along on a motor cycle: the second appellant as rider and the first appellant as pillion. The first appellant carried a bag which was later proved to contain a quantity of a dangerous drug. On arrival, the second appellant asked the first appellant to hand the bag containing the drug to PW3. A short while later, the appellants were arrested. They were then d charged, tried and convicted as aforesaid. These are the facts.

Counsel for the appellants attacked their convictions on several grounds. However it suffices to consider only two matters. The first has to do with the role of the first appellant's participation in the transaction that forms the core of the prosecution's case. It appears from the evidence that the only role that e the first appellant played was to hand the bag to PW3. As both appellants were charged with having committed the offence with common intention, it was incumbent on the prosecution to establish that ingredient. As to what amounts to common intention, Augustine Paul J in *Public Prosecutor v. Mohd Farid* [2002] 3 MLJ 401 said:

f

> It is essential that the participants have some knowledge that an act may be committed which is consistent with or would be in furtherance of the common intention. The prosecution must establish that there was a prearranged plan to commit a criminal act and the crime forming the subject matter of the charge was done in concert pursuant to that prearranged plan (see *Dato' Mokhtar bin Hashim & Anor v. PP* [1983] 2 MLJ 232; *Ong Chee Hoe & Anor v. PP* [1999] 4 SLR 688). It is difficult to prove common intention by direct evidence. It is usually inferred from the facts of a particular case.

g

In *Public Prosecutor v. Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401, the same learned judge said:

h

> The law that I have discussed shows that in order to establish that the accused persons acted with common intention, the prosecution must show that there is a link between them with regard to the cannabis that was recovered.

i

On the present facts, the prosecution had to establish that the first appellant had knowledge that the bag contained the proscribed drug. We have already recited the most telling facts against the first appellant. In our view his mere presence at the scene and his obedience to the second appellant's request to hand the bag to PW3 admits of several inferences, including the inference that the first appellant was unaware of the bag's contents. As the inference most favourable to the accused must be drawn, it is clear that an essential element of the offence charged had gone unproved.

We were reminded more than once by the learned deputy that this is a case in which the prosecution was seeking to establish trafficking by direct evidence without resort to any statutory presumption. More so then must the prosecution prove a prearranged plan to traffic in the drug in question. For there to be a pre-arranged plan, it must be shown that the first appellant knew about the contents of the bag. And as we have already said, there are simply no material from which such knowledge could be inferred.

As Kitto J said in *Jones v. Dunkel* [1958-1959] 101 CLR 298, at p. 305:

> One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that actual case a specific event happened or a specific state of affairs existed.

Needless to say, the facts here confine the court to the realm of conjecture on the issue of the existence of a pre-arranged plan.

Based on the facts established by the prosecution, we simply had no choice but to find for the first appellant. The conviction entered against him was therefore quashed and he was acquitted and discharged of the offence with which he was charged.

That brings us to the case of the second appellant. Once the case against the first appellant falls, the element of common intention becomes irrelevant *vis a vis* the second appellant. What remains is the question whether he trafficked in the drugs in question. The learned deputy argued that since his case was based on direct evidence of trafficking, it was sufficient for him to bring his case within any one of the several modes defined as trafficking by s. 2 of the Act.

With respect, we find ourselves unable to agree with this submission. As pointed out by the Supreme Court in *Chow Kok Keong v. Public Prosecutor* [1998] 2 CLJ 469, the wide definition of "trafficking" under the Act "are subject to the requirement of context". In the present context, the crux of the prosecution case

is that the second appellant was concerned in the sale of the drug in question to PW3. This appears quite clearly from the submission made by the learned deputy who appeared in the court below. (See Record of Appeal, p. 87). That is the case advanced before us by the learned deputy who argued this appeal.

Mr. Karpal Singh has argued that the evidence does not disclose a negotiated sale. We agree. Unfortunately, this is a point which the learned trial judge appears to have overlooked. From his grounds of judgment he appears to have been distracted by the wide definition of trafficking instead of focussing on the facts relied upon by the prosecution as constituting trafficking. Viewing the evidence as a whole, we find the conviction of the second appellant to be unsafe.

There is, however, the evidence that at the scene of the incident it was the second appellant who asked the first appellant to hand over the bag to PW3. This shows that it was the second appellant who had the bag containing the drug under his control. Accordingly s. 37(d) of the Act which reads:

> any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

applies. It is therefore our judgment that the prosecution had established beyond a reasonable doubt that the second appellant was in possession of the 2,411.9 grams of cannabis which is the subject matter of the charge. Accordingly, we set aside the conviction of the second appellant under s. 39B(2) of the Act and substituted in its place a conviction under s. 39A(2) of the Act. After hearing the plea in mitigation and taking into account all the relevant circumstances, in particular the public interest, we imposed a sentence of 15 years imprisonment and the mandatory 10 strokes of the rottan.